INDEX.

PAGE

Statement 1

POINT I. The Trial Court correctly held and the Appellate Division and Court of Appeals properly affirmed the refusal to treat Claimant's land as having only abandoned farm land value 3

POINT II. The Courts below have properly found that there was an enlargement of the taking under the temporary easement of 1954 7

POINT III. For the foregoing reasons, this Petition for a Writ of Certiorari to the Court of Claims of the State of New York should in all respects be denied 9

Appendix A—Option, made May 24, 1930, between Justin B. Andrews and Evelyn C. Andrews, his wife, and Frontier Corporation 10

CASE CITED.

United States v. Miller, 317 U. S. 369 8

IN THE

Supreme Court of the United States

October Term, 1961

No.

THE STATE OF NEW YORK and POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioners,

v.

JOHN M. ANDREWS, LENA BRITTON and VELMA NILES,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

Statement

The property involved in this proceeding, consists of 285.6 acres of land having a frontage of approximately 3450 feet on the St. Lawrence River, a depth of 1.221 miles and is opposite Barnhardt Island, St. Lawrence County. The property was acquired by Claimants-Respondents' Father by two deeds, one in 1897 and the other in 1907, and the property has been continuously in the Andrews family from those dates to the time of appropriation (Record 55-56).

The Court of Claims held "The Court finds that the fair market value of the land appropriated is $65,000.00" (Record 28), and "Claimants are entitled to interest on the sum of $65,000.00 from January 3, 1956 to July 3, 1956 and from October 31, 1956 to April 28, 1958, and from September 16, 1958 to the date of entry of judgment as provided by Order of this Court" (Record 31).

The Claimant Andrews testified that the property was held by his family since 1907 "For the development of the St. Lawrence Power with that thought primarily in mind", and, further, "for the purpose of the development of the power in the St. Lawrence and the corollary use of the Seaway" (Record 108-109).

Commencing in 1930, the Andrews family gave an option to purchase the entire property to the Frontier Corporation and later to its successors Niagara Hudson and Niagara Mohawk Power Corporation. These options continued yearly down to and including the year 1941 (Record 178). A copy of the option for 1930 is printed in the appendix and the other options were the same except for different option prices for different years.

In addition to the options on the Andrews property, Frontier and its successors owned approximately 4500 acres of land (Record 168) held for the purpose of being utilized in the event that private interests should develop electric power in the St. Lawrence River. Options were no longer taken on the Andrews property after 1941 as the Power Authority of the State of New York came into being and there was no further chance of private development (Record 187).

On October 6, 1954, there was filed in the Office of the Department of State a map covering a temporary ease-

ment on approximately 27 of the 285.6 acres of the Andrews property which fronted on the St. Lawrence River for a steel truss floating bridge approach and appurtenances "for use and exercisable during the construction of the St. Lawrence project until the approval of the completed work, unless sooner terminated if deemed no longer necessary for Power Authority of the State of New York purposes and released by order of the Chairman of the Power Authority of the State of New York". The State, its agents, entered upon the property described in that Map on or about October 13, 1954 (Record 61-62). Subsequently, and about six months later, a Map covering the fee to the entire plot, including the property described in the October 1954 temporary easement, and the balance of Claimants' land was filed in the Office of the Department of State on March 21, 1955. On the 23rd day of December, 1955, a further Map covering the fee to the entire plot was filed in the Office of the Department of State.

POINT I

The Trial Court correctly held and the Appellate Division and Court of Appeals properly affirmed the refusal to treat Claimant's land as having only abandoned farm land value.

The best available use of the Andrews property at the time of taking was not abandoned farm land but it had an additional value outside of its farm character long prior to the development of the St. Lawrence Power and Seaway which must be recognized in fixing its fair value at the time of taking.

For generations there has been under consideration the development of the St. Lawrence River for power pur-

poses, both by the United States and Canada and private utilities. This Court will certainly take judicial notice of this fact and in addition to that, we have concrete evidence in this record of this fact.

In the years prior to 1941 Niagara Mohawk Power Corporation began to lay plans for the development of power at the Barnhart Island site exactly where the great power dam has been erected and is in operation. By 1941 Niagara Mohawk Power Corporation had acquired practically the entire face of Barnhart Island and also lands on the adjoining mainland.

Frontier Corporation had been formed in 1921 and it became a part of the Niagara Hudson System in August, 1929. The securities of Niagara Hudson Power Corporation were issued to stockholders of Frontier Corporation and thus Niagara Hudson Power Corporation acquired 100% of the stock of Frontier Corporation (Folio 160).

Niagara Mohawk Power Corporation succeeded Niagara Hudson Power Corporation. It dissolved Frontier Corporation and it thus acquired all of the real estate holdings of the Frontier Corporation as shown in Exhibit 26 (Folio 161).

All of these properties originally owned by Frontier Corporation and later owned by Niagara Mohawk Power Corporation were appropriated by the state in connection with this power development, and it filed a claim in connection with this same appropriation for the value of those properties, which it had acquired from Frontier Corporation and lost through this appropriation.

These lands which came from Frontier Corporation to Niagara Mohawk Power Corporation and which were ap-

propriated by the state consisted of approximately 4500 acres of land (Folio 497).

In connection with the acquisition of 4500 acres of land on Barnhart Island and on the mainland the Niagara Hudson Power Corporation and or Niagara Mohawk Power Corporation was in complete control of the situation at all times from 1930 to the end of 1941, apparently deeming that its ownership of the Andrews property would be necessary to the production and distribution of power by it at the Barnhart Island site, took options to purchase that property.

These options, twelve in all, and the receipts for the consideration in connection with the same, are Exhibits 17 to 23, received in evidence (Folio 536) (Appendix).

Exhibit 23 consists of 8 of these options. These options, each for one year, were given in each instance to Frontier Corporation; the first three for the years 1930, 1931 and 1932 were given by Justin B. Andrews and his wife, and the succeeding options for the years 1933 to 1941, both inclusive, were given by the executors and heirs of Justin B. Andrews.

For the first two years, 1930 to 1931, Frontier Corporation paid for the option $1,000. per year. For the year 1932 Frontier Corporation paid $700. for the option, and for the succeeding years, 1933 to 1941, both inclusive, it paid to the executors of Justin B. Andrews for the option in each year the sum of $500.

In connection with each option and each year of the option period, 1930 to 1941, Frontier Corporation considered it so necessary for it to acquire this property that it willingly paid these substantial considerations early and in

addition thereto, in each option, it agreed that if the option were exercised, it would pay for the property, in addition to the stated consideration for the option, the sum of $250. per acre for the land and the replacement value of the buildings thereon. It will thus be seen if any option had been exercised Frontier Corporation would have been required to pay the owners, in addition to the option consideration, the total sum of $71,365. for the 285.46 acres of land, plus the replacement costs of the buildings.

These options, while not ordinary purchases and sales, we think are dependable evidence and were properly relied upon in this case on two subjects (1) the highest available use of the Andrews property, and (2) its value.

It can be readily seen from this proof that the land of the Claimants had a character other than farm land long prior to the time when this development, which required the taking of this land, had its inception.

In the last Paragraph of the petition herein, Page 16, petitioners state that the Authority is engaged in the construction of 200 miles of transmission lines and that it has taken, or is taking, several thousand parcels of land and that there are upwards of 150 lawsuits pending with respects to these takings.

It is inconceivable that any of the properties involved in these takings are at all similar to the Claimants' properties which were covered by options to a private developer for 11 years as the Andrews' appropriation was probably unique in all of the takings of the Power Authority by reason of these options.

POINT II

The Courts below have properly found that there was an enlargement of the taking under the temporary easement of 1954.

The opinion in the Court of Claims holds that Claimant's Exhibit No. 34, prepared by the United States Corps of Engineers in 1942 "does not show this property as being used for any part of the comprehensive river development," and further at Record 23:

> "The State's own procedure indicates that it was only after the project was well under way that the determination was made that the appropriation of this property was desirable and necessary for the development. The State's witness testified that the original planning for power transmission did not provide for a transmission line on this property. The original Appropriation Map filed in the office of the Secretary of State covered only a temporary easement over the property located between the St. Lawrence River Road and the river. Thus it cannot be said that there was any increase in value from 'the known fact that the lands probably would be condemned' (United States v. Miller, 317 U. S. 369 at 377) since there was no such knowledge in this case."

Beginning on Record 372, Folio 1116 Mr. Siemer, who on the trial represented both appellants, clearly demonstrated that there had been an enlargement of the project affecting the lands of the claimants. In his re-direct examination of the State's witness, Vredenburg, he showed originally the power transmission line was planned at another location than Hawkins Point (Claimants' lands), and that that fact had been shown upon the maps; that the transmission power line from Barnhart Island was originally planned on adjoining property to the west of the lands of the claimants, and at Record 373, Folio 1117 re-

ferring to the same map, the following appears, still on Mr. Siemer's re-direct examination of the witness:

"Q. And it didn't touch this property at all, did it?
A. No."

and further on re-direct examination of the same witness at folio 1119:

"Q. The plans that were given to you, the layout of this whole area showing the power plant and all of these properties to be required, showed the Power transmission lines from Barnhart Island to where?
A. To the mainland, crossing the adjoining farm, I believe, on the west.
Q. Did they show any transmission lines on the Andrews property?
A. No."

It was brought out at Record 374 that this state map had been made in 1956. By the examination of this witness, the state itself clearly demonstrated and proved that there had been an enlargement of the project, and that originally the project had not even contemplated the use of claimants' lands whatever.

In United States vs. Miller (317 U. S. 369), this Court squarely held that if the government after condemning a definite area at a later date enlarges its projects and determines to take other lands in the neighborhood it must pay the fair market value as enhanced by the factor of proximity to the public improvements erected on the land first taken.

POINT III

For the foregoing reasons, this Petition for a Writ of Certiorari to the Court of Claims of the State of New York should in all respects be denied.

Respectfully submitted,

SKIVINGTON & SKIVINGTON
Attorneys for Respondents
Office and P. O. Address
511 Wilder Building
Rochester 14, New York

GEORGE J. SKIVINGTON, JR.
of Counsel

Appendix A

THIS INDENTURE

Made this twenty-fourth day of May, one thousand nine hundred and thirty,

BETWEEN, JUSTIN B. ANDREWS and EVELYN C. ANDREWS, his wife, both of the village of Messena, county of Saint Lawrence and state of New York, parties of the first part, and

FRONTIER CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the state of New York, and having an office for the AJH transaction of business in the village of Potsdam, county of Saint Lawrence and state of New York, party of the second part:

WITNESSETH: That the said parties of the first part, for themselves, their heirs, executors, administrators and assigns, for and in consideration of the sum of ONE THOUSAND DOLLARS ($1,000.00), to them in hand paid, the receipt whereof, is hereby acknowledged, have covenanted and agreed, and by these presents do hereby covenant and agree to and with said party of the second part, its successors and assigns, that they will well and sufficiently grant and convey to the said party of the second part, its successors and assigns, by full warranty deed, free from all incumbrances of any kind or nature whatsoever, except as hereinafter recited,

ALL THAT TRACT OR PARCEL OF LAND, situate in the town of Massena, county of Saint Lawrence and state of New York, consisting of a farm of two hundred eighty-three (283) acres in School District No. Six, according to the 1925 assessment roll of said town, which said

farm is bounded on the north by the St. Lawrence River, east by the farms of David I. Sheets and Fred Bridges, south by the farms of Frego and Brewer and west by the center of the cross road from the Brewer farm to the St. Lawrence River Road, and the farms of Payment and Layo, upon the further payment of the sum of two hundred fifty dollars ($250.00) per acre for the land according to survey, and the replacement value of the buildings thereon as determined by two independent builders and contractors selected respectively by the parties hereto and a third if necessary by the two so selected; twenty per cent (20%) of the total purchase price payable on exercise of this option, thirty per cent (30%) on delivery of deed and possession on or before November 1, 1931, and balance in cash or purchase money mortgage for not exceeding three years with interest at five per cent (5%) at option of parties of the first part, ~~provided the party of the second part shall~~ AJH ~~accept the terms of this contract within three months from the date hereof,~~ said parties of the first part to furnish a full and complete transcript or abstract of title, certified to by the county clerk, also to pay one-half cost of surveying.

It is agreed that this option shall not be recorded in the clerk's office of the county of Saint Lawrence and in the event of such recording, this agreement shall immediately become null and void.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JUSTIN B. ANDREWS. L. S.
EVELYN C. ANDREWS. L. S.

Appendix A

State of New York,
County of Saint Lawrence. } ss.:

On this twenty-fourth day of May, in the year Nineteen Hundred and Thirty, before me, the subscriber, personally appeared JUSTIN B. ANDREWS and EVELYN C. ANDREWS, to me known and known to me to be the same persons described in and who executed the foregoing Instrument, and they duly severally acknowledged to me that they executed the same.

ANDREW J. HANMER
Notary Public

I hereby agree to the above option.

RECEIVED from Frontier Corporation ONE THOUSAND DOLLARS ($1,000.00), being the full consideration for the option dated May 24, 1930, given by the undersigned to Frontier Corporation, which option expires May 24, 1931.

Dated: May 24, 1930.

JUSTIN B. ANDREWS
Justin B. Andrews
EVELYN C. ANDREWS
Evelyn C. Andrews

No. 460

FILED
F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

THE STATE OF NEW YORK and POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioners,

v.

JOHN M. ANDREWS, LENA BRITTON and VELMA NILES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

LOUIS J. LEFKOWITZ,
Attorney General of the
State of New York,
The Capitol,
Albany 1, N. Y.
Attorney for Petitioner,
THE STATE OF NEW YORK.

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, N. Y.
Attorney for Petitioner,
POWER AUTHORITY OF THE
STATE OF NEW YORK

November 1, 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 460

THE STATE OF NEW YORK AND POWER AUTHORITY OF THE STATE OF NEW YORK,

Petitioners,

v.

JOHN M. ANDREWS, LENA BRITTON and VELMA NILES,

Respondents.

PETITIONERS' REPLY BRIEF

Respondents' brief in opposition to the petition for certiorari demonstrates clearly that the petition should be granted. In Point I it argues that the highest and best available use of the property was for power purposes and that its value was properly fixed on that basis. The brief not only concedes but avers that the Court of Claims so valued the property and that the Appellate Division of the Supreme Court and the Court of Appeals affirmed its

doing so. This confirms that the New York courts refused to apply the doctrines of *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), *United States* v. *Miller*, 317 U. S. 369 (1943), *United States* v. *Cors*, 337 U. S. 325 (1949), *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956) and *United States* v. *Virginia Electric and Power Co.*, 365 U. S. 624 (1961). It is important that this Court specifically affirm the application of those doctrines to the taking of land in state courts pursuant to authorization of the Federal Power Act for a federally authorized power project and a federally constructed navigation project.

After demonstrating in Point I that from the outset the property was needed for project purposes and thus that it was always probable and likely that it would be taken, the brief with complete inconsistency argues in Point II that there was an enlargement of the project within the meaning of the *Miller* case. However, the facts set forth in the brief show that there was no enlargement. The brief argues that there was an enlargement because a witness testified at the trial in 1958 that he had in his possession a map prepared in 1956 showing that transmission lines from Barnhart Island would cross adjoining land rather than respondents' land and that later the project plans were changed so that those lines were placed on respondents' land. The brief (p. 3) shows, however, that an appropriation map covering respondents' entire property had been filed early in 1955. Thus, even if there was a time in 1956 when plans for the project, construction of which had commenced in 1954, did not contemplate use of the property for that one set of transmission lines and these plans were later changed this would not constitute an enlargement of the project because the process of taking the entire property had been initiated and the Authority had entered and taken

possession of it more than a year earlier.* The brief does not mention two other sets of transmission lines which came from Canada and crossed the property, nor does it mention the fact that, as we showed in our petition, the property was taken for several other project purposes including the seaway canal and overflow from it, all as planned in the Corps of Engineers report issued in 1942.

Respondents' brief (p. 7) states that "The opinion in the Court of Claims holds that Claimant's Exhibit No. 34, prepared by the United States Corps of Engineers in 1942 'does not show this property as being used for any part of the comprehensive river development,' ". As we pointed out in our petition apparently the Court was of the opinion that unless property is flooded by the actual damming of the stream it is not used as part of a comprehensive river development even if used for a canal to bypass dams and used to transmit power developed from the stream and for other purposes of the joint project. This is the only conclusion possible because the Exhibit shows the seaway canal and overflow from it utilizing a good part of the property and the 1942 report shows that the entire property would be taken for project purposes (Petition, pp. 11-12).

As we have shown in our petition, even if there had been an enlargement the Court of Claims award was wrong because as that Court categorically stated and as the Court

---

* As we amply demonstrated in our petition and a reading of the whole record shows, it was always probable and likely that the property would be used for transmission lines from Barnhart Island as well as other project purposes despite the testimony of the witness and his apparent misreading of the 1956 map he had in his possession (R. 41-42, 71, 120-121, 206, 215). Respondents' own witness testified that the property constituted the most logical location for such lines (See R. 215).

of Appeals pointed out it was based upon use of the property for the very purposes of the project.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of
the State of New York,
The Capitol,
Albany 1, N. Y.
Attorney for Petitioner,
THE STATE OF NEW YORK.

JULIUS L. SACKMAN,
Of Counsel.

THOMAS F. MOORE, JR.,
10 Columbus Circle,
New York 19, N. Y.
Attorney for Petitioner,
POWER AUTHORITY OF THE
STATE OF NEW YORK.

November 1, 1961